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**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 5**

**[Docket ID OCC-2014-0024]**

**RIN 1557-AD73**

**Subordinated Debt Issued by a National Bank**

**AGENCY:** Office of the Comptroller of the Currency, Treasury.

**ACTION:** Interim final rule and request for comments.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is amending its interim final rule making Basel III conforming amendments related to cross-references, subordinated debt and limits based on regulatory capital. The interim final rule, published in the **Federal Register** on February 28, 2014, revised and clarified the OCC's rules governing subordinated debt issued by national banks and Federal savings associations to make those rules consistent with the 2013 revised capital rules. The OCC is further clarifying the subordinated debt rules for national banks by moving certain provisions from national bank guidance to the rules and making other clarifying and technical amendments.

**DATES:** This interim final rule is effective January 1, 2015. Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title "Subordinated Debt Issued by a National Bank" to facilitate the

organization and distribution of the comments. You may submit comments by any of the following methods:

- **Federal eRulemaking Portal—"Regulations.gov":** Go to [www.regulations.gov](http://www.regulations.gov). Enter "Docket ID OCC-2014-0024" in the Search Box and click "Search." Results can be filtered using the filtering tools on the left side of the screen. Click on "Comment Now" to submit public comments.
- Click on the "Help" tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.
- **E-mail:** [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).
- **Mail:** Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW., Suite 3E-218, Mail Stop 9W-11, Washington, DC 20219.
- **Hand Delivery/Courier:** 400 7<sup>th</sup> Street, SW., Suite 3E-218, Mail Stop 9W-11, Washington, DC 20219.
- **Fax:** (571) 465-4326.

*Instructions:* You must include "OCC" as the agency name and "Docket ID OCC-2014-0024" in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- **Viewing Comments Electronically:** Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID OCC-2014-0024” in the Search box and click "Search." Comments can be filtered by Agency using the filtering tools on the left side of the screen.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- **Viewing Comments Personally:** You may personally inspect and photocopy comments at the OCC, 400 7th Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.
- **Docket:** You may also view or request available background documents and project summaries using the methods described above.

**FOR FURTHER INFORMATION CONTACT:** Jean Campbell, Senior Attorney, Legislative and Regulatory Activities Division, (202) 649-5490; and Patricia D. Goings, Senior Licensing Analyst, or Patricia Roberts, Senior Licensing Analyst, Licensing Division, (202) 649-6260.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

On October 11, 2013, the OCC published in the **Federal Register** the 2013 revised capital rules,<sup>1</sup> which listed, at 12 CFR 3.20(d), the criteria that an instrument must satisfy to be included in tier 2 capital. The mandatory compliance date for the 2013 revised capital rules is January 1, 2014, for advanced approaches national banks and Federal savings associations,<sup>2</sup> and January 1, 2015, for non-advanced approaches national banks and Federal savings associations.

On February 28, 2014, the OCC published an interim final rule (February 2014 interim final rule)<sup>3</sup> amending the OCC's rules to be consistent with the 2013 revised capital rules. The February 2014 interim final rule revised and clarified the OCC's rules, at 12 CFR 5.47 and 163.81,<sup>4</sup> governing subordinated debt issued by national banks and Federal savings associations, respectively, to make the subordinated debt rules consistent with the Basel III criteria. In order to accommodate the different compliance dates for advanced approaches national banks and Federal savings associations and non-advanced approaches national banks and Federal savings associations, the February 2014 interim final rule created two sets of provisions: the first set of provisions that contained the pre-Basel III version of the subordinated debt rules (with minimal

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<sup>1</sup> See 78 FR 62018 (Oct. 11, 2013). Among other things, this rule adopted the Basel III Capital Framework and revised Prompt Corrective Action requirements for national banks and Federal savings associations.

<sup>2</sup> The Basel III Capital Framework, at 12 CFR 3.100(b)(1), defines an advanced approaches national bank or Federal savings association to mean a national bank or Federal savings association that:

1. Has consolidated total assets, as reported on its most recent year-end Consolidated Reports of Condition and Income (Call Report) equal to \$250 billion or more;

2. Has consolidated total on-balance sheet foreign exposure on its most recent year-end Call Report equal to \$10 billion or more (where total on-balance sheet foreign exposure equals total cross-border claims less claims with a head office or guarantor located in another country plus redistributed guaranteed amounts to the country of head office or guarantor plus local country claims on local residents plus revaluation gains on foreign exchange and derivative products, calculated in accordance with the Federal Financial Institutions Examination Council (FFIEC) 009 Country Exposure Report);

3. Is a subsidiary of a depository institution that uses the advanced approaches pursuant to subpart E of 12 CFR part 3 (OCC), 12 CFR part 217 (Board of Governors of the Federal Reserve System) (Board), or 12 CFR part 325 (Federal Deposit Insurance Corporation) (FDIC) to calculate its total risk-weighted assets;

4. Is a subsidiary of a bank holding company or savings and loan holding company that uses the advanced approaches pursuant to 12 CFR part 217 to calculate its total risk-weighted assets; or

5. Elects to use subpart E of 12 CFR part 3 to calculate its total risk-weighted assets.

<sup>3</sup> See 79 FR 11300 (Feb. 28, 2014).

<sup>4</sup> The OCC recently proposed to move 12 CFR 163.81 to 12 CFR 5.56. See 79 FR 33260 (June 10, 2014).

changes), and the second set of provisions that contained the new Basel III-conforming subordinated debt rules.

The second set of provisions incorporated substantive changes necessary to be consistent with the Basel III Capital Framework for subordinated debt. With respect to tier 2 capital instruments, those changes include: (i) requiring all national banks and Federal savings associations to obtain prior OCC approval to prepay subordinated debt; (ii) prohibiting the holder of subordinated debt from having a contractual right to accelerate principal or interest on the instrument, except in the event of a receivership, insolvency, liquidation, or other similar proceeding; and (iii) prohibiting the exercise of a call option in the first five years following issuance, except in certain very limited circumstances.

As described in the preamble to the February 2014 interim final rule, this structure was intended to be temporary. The next section of this Supplementary Information describes in detail the changes the OCC is making in this interim final rule to further clarify the subordinated debt rules applicable to national banks under § 5.47.

Because of differences in the respective rules and guidance applicable to national banks and Federal savings associations, changes to 12 CFR 163.81 are not being made at this time. In the future, the OCC will consider integrating its rules regarding the issuance of subordinated debt for national banks and Federal savings associations.

## **II. Changes to § 5.47 Applicable to National Banks**

### **A. Structural Changes**

Beginning January 1, 2015, the first set of provisions at paragraphs (b) through (i) will no longer be necessary because they provide the old criteria and procedures for issuance and prepayment of subordinated debt that are not consistent with the Basel III Capital Framework. Accordingly, the OCC is deleting the first set of provisions and renumbering the second set of

provisions. In addition, the OCC is making technical amendments throughout § 5.47 to remove all references to timing differences for advanced approaches national banks and non-advanced approaches national banks.

## **B. Requirements Applicable to Subordinated Debt**

### **1. Guidelines for Subordinated Debt**

Following publication of the February 2014 interim final rule, the OCC undertook a review of its guidance for subordinated debt issued by a national bank to make it consistent with the Basel III Capital Framework and the amendments to § 5.47. As a result of that review, the OCC has decided that most of the practices and disclosures described in Appendix A of the Subordinated Debt booklet of the Licensing Manual (current Guidelines) should be moved to § 5.47 to locate applicable requirements in one place. The changes to § 5.47 are described in Section II.B.2. of this Supplementary Information.

We note that, with a few exceptions described in Section II.B.2. of this Supplementary Information, the changes do not increase burden for institutions issuing subordinated debt. Typically, subordinated debt notes issued by national banks were consistent with the practices and disclosures described in the current Guidelines for a number of practical reasons, including making the review process quicker and more efficient and avoiding unnecessary burden and effort by the national bank by using sample language provided in the current Guidelines. The new requirements in this interim final rule are: (1) a new disclosure related to the OCC's authority under 12 CFR 3.11 to limit distributions, including interest payments on any tier 2 capital instrument if the national bank has full discretion to permanently or temporarily suspend such payments without triggering an event of default; and (2) an expanded prohibition on covenants or provisions that unreasonably restrict a national bank's ability to raise additional

capital through the issuance of additional subordinated debt or other regulatory capital instruments.

Prior to the effective date of this interim final rule, the OCC plans to issue revised Guidelines for Subordinated Debt Issued by National Banks (revised Guidelines) and a revised sample note that are consistent with the 2013 revised capital rules and the amendments to § 5.47 made by the February 2014 interim final rule.

2. Description of Changes to § 5.47

The pre-Basel III rules were ambiguous regarding what, if any, requirements apply to subordinated debt that is not included in tier 2 capital. Accordingly, the February 2014 interim final rule clarified that certain basic requirements apply to all subordinated debt by adding the substantive requirements in § 3.701(f)(1) to the subordinated debt rule. The pre-Basel III rules generally did not require eligible national banks to obtain prior approval to prepay subordinated debt. However, the Basel III Capital Framework requires prior approval to prepay subordinated debt included in tier 2 capital. Therefore, the February 2014 interim final rule required that all national banks, not just eligible national banks, obtain prior approval to prepay such subordinated debt. In addition, the Basel III Capital Framework imposes additional requirements on a prepayment in the form of a call option, and the February 2014 interim final rule added those requirements to the subordinated debt rules.

The OCC is amending the name of paragraph (a) by deleting “and applicability” from the title of paragraph (a); adding additional statutory cites in paragraph (a)(1); and deleting paragraph (a)(2), which provides different compliance dates for an advanced approaches national bank and a non-advanced approaches national bank.

The OCC is redesignating current paragraph (j), “Scope,” as new paragraph (b). New paragraph (b) is amended to clarify that, in addition to setting forth procedures for the OCC’s

review and approval of subordinated debt, § 5.47 also sets forth requirements that are applicable to all subordinated debt issued by a national bank. The OCC believes this change more accurately reflects the content of § 5.47 and alerts a national bank that certain requirements apply to all subordinated debt, even if the national bank is not required to file an application to issue or prepay subordinated debt or a notice to include the subordinated debt in regulatory capital.

The OCC is redesignating current paragraph (k), “Definitions,” as new paragraph (c) and adding two new definitions. The new definitions are “payment on subordinated debt” and “original maturity.” The OCC is adding these definitions to clarify the meaning of those terms as they are used in § 5.47. “Payment on subordinated debt” is defined to mean principal and interest, and premium, if any, and “original maturity” is defined to mean the stated maturity of the subordinated debt note. While the definition of “payment on subordinated debt” is new, the substance of this definition reflects the prior understanding of payment as reflected in the language of the disclosures in the current Guidelines. The new definition of “original maturity” further clarifies that if a subordinated debt note does not have a stated maturity, the original maturity would be the earliest possible date the subordinated debt note may be redeemed, repurchased, prepaid, terminated, or otherwise retired by the national bank pursuant to the terms of such note. This definition of “original maturity” is consistent with existing OCC precedent.

The OCC is redesignating current paragraph (l) as new paragraph (d); renaming new paragraph (d) “Requirements for issuance of subordinated debt”; adding a heading to new paragraph (d)(1), “Minimum terms”; and redesignating current paragraph (l)(1)(viii) as new paragraph (d)(3)(iii). The OCC also is revising paragraph (d)(1); redesignating paragraph (d)(2) as new paragraph (e); and adding new paragraphs (d)(2) and (d)(3), as described in greater detail below.



In addition, in redesignated paragraph (d)(1)(iv) the OCC is clarifying the meaning of the term “unsecured” by providing that a subordinated debt note must not include the establishment of any legally enforceable fund for payment of the subordinated debt note through: (i) a sinking fund; or (ii) a compensating balance or other funds or assets subject to a legal right of offset, as defined by applicable state law. This concept of a sinking fund or compensating balance is being moved to paragraph (d)(1)(iv) from the current Guidelines. The OCC is concerned with any type of arrangement that acts, in economic substance, to create a secured arrangement between the note holder and the issuing national bank. The OCC has concluded that a sinking fund or similar arrangement that sets aside assets of a national bank constitutes a de facto secured arrangement or interest for the benefit of the subordinated note holder because, in the event of insolvency, the proceeds from the sale of the assets securing the loan would function like collateral and would be applied to the obligations of the holder of the subordinated debt note, which would place the note holder senior in right of payment to other creditors. Compensating balances, while rare, also have the potential to place the note holder in a de facto secured position. The concern is that, under state law, a correspondent bank may have a right of offset against the compensating balance for any amount due on the note. Therefore, the OCC is prohibiting such an arrangement with respect to the issuance of subordinated debt where a legally enforceable right of offset exists because it constitutes a secured arrangement for the benefit of the note holder.

The OCC is adding new paragraph (d)(2), “Corporate authority.” New paragraph (d)(2) prohibits the inclusion of any provision or covenant in a subordinated debt note that unduly restricts or otherwise limits the authority of a national bank or interferes with the OCC’s supervision of the national bank. The OCC is moving five examples of provisions or covenants to new paragraph (d)(2) from the current Guidelines. Although these provisions are being added as new provisions to the regulations, as described in Section II.B.1. of this Supplementary

Information, national banks currently comply with the substance of these provisions. New paragraph (d)(2)(i) prohibits a covenant or provision in which the national bank agrees to maintain a certain minimum amount in its capital accounts, or minimum assets, liquidity, loan ratios or other similar metrics. Pursuant to 12 U.S.C. 1818 and 3907, the OCC seeks to prohibit unsafe or unsound banking practices and promote maintenance of a national bank's capital, particularly when a national bank is experiencing financial difficulties. While a statement affirming the national bank's current condition would be acceptable, a covenant that would require a national bank to maintain on an ongoing basis a specified minimum amount in its capital accounts, or minimum capital assets, liquidity, loan ratios or other similar metrics, potentially would subject the national bank to acceleration at the very point in time when the national bank should seek to maintain its capital. The OCC believes this would constitute an unsafe or unsound banking practice and therefore is prohibiting such a covenant.

New paragraph (d)(2)(ii) prohibits a covenant or provision that unduly restricts a national bank's ability to raise additional capital through the issuance of additional subordinated debt or other regulatory capital instruments. The OCC believes that it would constitute an unsafe or unsound banking practice if a national bank agreed to such a covenant. The OCC notes that this provision mirrors similar restrictions in the 2013 revised capital rules for additional tier 1 capital and the wording in the current Guidelines has been expanded to cover the issuance of all regulatory capital instruments, including additional subordinated debt. An example of a prohibited covenant, which is provided in the current Guidelines, would be one that requires any subordinated debt issued by the national bank in the future to be junior in right of payment to the current issuance. The OCC believes this requirement reflects a fundamental supervisory policy that is equally applicable to all capital instruments, not just tier 1 instruments, and that the

underlying concern that such a covenant in a subordinated debt note would unreasonably restrict a national bank's ability to raise capital in the future is equally applicable to subordinated debt.

New paragraph (d)(2)(iii) prohibits a covenant or provision that provides for default and acceleration of the subordinated debt as the result of a change in control, if such change in control results from the OCC's exercise of its statutory authority to require a national bank to sell stock in that national bank, enter into a merger or consolidation, or be acquired by a bank holding company. In a situation where a national bank is considered "significantly undercapitalized" as defined under applicable law, or in certain circumstances where it is considered "undercapitalized," the OCC has broad statutory authority to require a national bank to sell stock in the national bank, enter into a merger or consolidation, or be acquired by a bank holding company. In such a case, the OCC does not allow a change in control resulting from such OCC action to constitute a default. Therefore, the OCC is adding this prohibition. The OCC believes that, in practice, such a clause is unnecessary because when the OCC directs the merger or acquisition of the national bank, the OCC requires the purchaser of a national bank to assume the obligation on the subordinated debt note, which provides adequate protection to the note holder.

New paragraph (d)(2)(iv) prohibits a covenant or provision that requires the prior approval of a purchaser or holder of the subordinated debt note in the case of a voluntary merger by a national bank where the resulting institution assumes the due and punctual performance of all conditions of the subordinated debt note and agreement and is not in default of the various covenants of the subordinated debt. The OCC is moving this provision from the current Guidelines to paragraph (d)(2)(iv) with one simplifying change; the rule does not require the resulting institution to be a commercial bank. The OCC believes that the amended language sufficiently protects the note holder by permitting a default clause if a voluntary merger does not

satisfy these conditions, while at the same time not interfering with a national bank's ability to exercise its business judgment and manage the national bank in a manner that avoids unsafe or unsound banking practices.

Paragraph (d)(2)(v) prohibits a covenant or provision that provides for default and acceleration of the subordinated debt as the result of a default by a subsidiary of the national bank (including a limited liability company), unless there is a separate agreement between the subsidiary and the purchaser of the national bank's subordinated debt note; and such separate agreement has been reviewed and approved by the OCC. While the OCC acknowledges that in some instances default by a subsidiary may signal financial difficulties of the parent national bank, the OCC believes it would be an unsafe or unsound banking practice if a technical or otherwise minor default by a subsidiary of the national bank could trigger the default of a national bank's subordinated debt note resulting in acceleration. Therefore, the rule allows such a default to occur only if there is a separate agreement between the subsidiary and the purchaser and the separate agreement has been reviewed and approved by the OCC.

The OCC is adding new paragraph (d)(3), "Disclosure requirements." New paragraph (d)(3)(i) provides two disclosures that the OCC has determined are sufficiently important to require that they must appear clearly on the face of a subordinated debt note in all capital letters using the exact language in paragraph (d)(3)(i). These disclosures, which are being moved to new paragraph (d)(3)(i) from the current Guidelines, state that the obligation is not a deposit and is not insured by the Federal Deposit Insurance Corporation (FDIC), and that the obligation is subordinated to claims of depositors and general creditors, is unsecured, and is ineligible as collateral for a loan by the issuing national bank.

New paragraph (d)(3)(ii) lists three types of disclosures that a national bank is required to make in the subordinated debt note. The OCC has determined that these disclosures contain

important information that must be disclosed to a potential purchaser of the subordinated debt note. However, rather than providing specific language for these disclosures, paragraph (d)(3)(ii) allows national banks discretion in how they word the disclosures, provided the disclosures are made clearly and accurately. Two of these disclosures are being moved to paragraph (d)(3)(ii) from the current Guidelines, and the third one is a new disclosure.

The first such disclosure, at paragraph (d)(3)(ii)(A), relates to the order and level of subordination. In addition to being subordinated to the claims of depositors, this disclosure provides that, at a minimum, the subordinated debt note is subordinate and junior in its right of payment to the obligations of all creditors, including both secured and unsecured or general creditors, except those specifically designated as ranking on a parity with, or subordinated to, the subordinated debt note. The second disclosure, at paragraph (d)(3)(ii)(B), is a general description of the OCC's regulatory authority with respect to a national bank in danger of insolvency that includes: (1) in the case of insolvency, that the FDIC, acting as receiver, has authority to transfer a national bank's obligation under the subordinated debt note and to supersede or void any default, acceleration, or subordination that may have occurred; (2) in the case of a national bank that is "undercapitalized" as defined by applicable law and fails to satisfactorily implement a required capital restoration plan, that the national bank may be subject to the additional restrictions and requirements applicable to a "significantly undercapitalized" institution, including being required to sell shares in the national bank, being acquired by a depository institution holding company, or being merged or consolidated with another depository institution, and this authority supersedes and voids any defaults that may have occurred; and (3) in the case of a national bank that is "critically undercapitalized," as defined by applicable law, that the national bank is prohibited from making principal or interest payments on the subordinated debt note without prior regulatory approval.

The third such disclosure, at paragraph (d)(3)(ii)(C), is a new disclosure that is not in the current Guidelines. It describes the OCC's authority under 12 CFR 3.11 to limit distributions, including interest payments on any tier 2 capital instrument if the national bank has full discretion to permanently or temporarily suspend such payments without triggering an event of default. The OCC believes that this disclosure is necessary to make clear to subordinated debt note holders the circumstances in which certain payments or other distributions related to the subordinated debt note could be limited and is particularly important in light of the potential new limitations under the Basel III Capital Framework.

Current paragraph (l)(1)(viii) requires that subordinated debt must comply with the Securities Offering Disclosure Rules in 12 CFR Part 16, and the OCC is retaining that requirement as redesignated paragraph (d)(3)(iii). The rules in Part 16 establish registration statement and prospectus requirements for the offer or sale of securities issued by a national bank, subject to exemptions.

The OCC notes that national banks also must comply with all applicable laws and regulations, such as the federal and state securities laws.

The OCC is redesignating current paragraph (l)(2), "Additional requirements to qualify as tier 2 capital," as new paragraph (e). In addition, the OCC is adding a reminder that 12 CFR 3.20(d)(1)(xi) requires an advanced approaches national bank to make a specific disclosure that holders of the instrument may be fully subordinated to interests held by the U.S. government in the event that the national bank enters into a receivership, insolvency, liquidation, or similar proceeding. The OCC also is deleting the requirement relating to applicable OCC guidance for subordinated debt, which will no longer be necessary because those practices and disclosures deemed to be most important by the OCC are being added to § 5.47.

The OCC is redesignating current paragraph (m) as new paragraph (f) and renaming new paragraph (f) “Process and procedures.” The OCC also is redesignating current paragraphs (n), (o), and (p) as new paragraphs (g), (h), and (i).

### **III. Request for Comments**

The OCC requests comment on all aspects of this interim final rule.

### **IV. Regulatory Analysis**

#### **A. Administrative Procedure Act**

Pursuant to the Administrative Procedure Act (APA),<sup>5</sup> at 5 U.S.C. 553(b)(B), notice and comment are not required prior to the issuance of a final rule if an agency, for good cause, finds that “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” The OCC finds that it is impracticable to seek prior notice and comment for the following reasons. Subordinated debt plays an important role in the capital and liquidity management of national banks. The February 2014 interim final rule revised and clarified the OCC’s rules governing subordinated debt issued by national banks to make those rules consistent with the 2013 revised capital rules. This interim final rule makes important clarifications to those subordinated debt rules by moving certain provisions from the current Guidelines to the rules and making other clarifying and technical amendments. This interim final rule is necessary because the 2013 revised capital rules will become applicable to non-advanced approaches national banks beginning January 1, 2015. Accordingly, the OCC finds good cause to issue this interim final rule.

The APA also requires that a substantive rule must be published not less than 30 days before its effective date, unless, among other things, the agency determines for good cause that

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<sup>5</sup> See 5 U.S.C. 553(b) and (d).

the rule should become effective before such time. For the reasons described above, the OCC finds good cause to dispense with the delayed effective date otherwise required.<sup>6</sup>

#### **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA)<sup>7</sup> generally requires an agency that is issuing a proposed rule to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. The RFA does not apply to a rulemaking where a general notice of proposed rulemaking is not required.<sup>8</sup> For the reasons described above, the OCC has determined, for good cause, that it is unnecessary to publish a notice of proposed rulemaking for this interim final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

#### **C. Unfunded Mandates Reform Act**

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more, as adjusted for inflation, in any one year. The Unfunded Mandates Reform Act only applies when an agency issues a general notice of proposed rulemaking. Because the OCC is not publishing a notice of proposed rulemaking, this final rule is not subject to section 202 of the Unfunded Mandates Reform Act.

#### **D. Paperwork Reduction Act**

Under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501-3520), the OCC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control

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<sup>6</sup> See *id.* at 553(d).

<sup>7</sup> See *id.* at 601 *et seq.*

<sup>8</sup> See *id.* at 603 and 604.



number. The majority of the information collection requirements contained in this interim final rule have previously been approved under OMB Control Nos. 1557-0014 and 1557-0320. The amendments published today do not modify the approved collections but add a disclosure requirement that needs OMB approval. Section 5.47(d)(3)(ii)(C) requires in the subordinated debt note, a description of the OCC's authority under 12 CFR 3.11 to limit distributions, including interest payments on any tier 2 capital instrument if the national bank has full discretion to permanently or temporarily suspend such payments without triggering an event of default. The OCC has submitted its collection under OMB Control No. 1557-0320 to OMB for revision to seek approval for this requirement.

Estimated Number of Respondents: 42.

Estimated Number of Responses per Respondent: 1.

Estimated Burden Hours per Response: 0.50 hours.

Total Estimated Burden: 21 hours.

Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information shall have practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

#### **List of Subjects in 12 CFR Part 5**

Administrative practice and procedure, National banks, Reporting and recordkeeping requirements, Securities.

### **Authority and Issuance**

For the reasons set forth in the preamble, the OCC amends 12 CFR Chapter I, part 5, as set forth below.

## **PART 5 – RULES, POLICIES, AND PROCEDURES FOR CORPORATE ACTIVITIES**

1. The authority citation for part 5 continues to read as follows:

12 U.S.C. 1 et seq., 93a, 215a-2, 215a-3, 481, and section 5136A of the Revised Statutes (12 U.S.C. 24a).

2. Revise § 5.47 to read as follows:

### **§ 5.47 Subordinated debt issued by a national bank.**

(a) Authority. 12 U.S.C. 93a, 1831o, and 3907.

(b) Scope. This section sets forth the requirements applicable to all subordinated debt notes issued by national banks and the procedures for OCC review and approval of a national bank's application to issue or prepay subordinated debt and a notice to include subordinated debt in tier 2 capital.

(c) Definitions. The following definitions apply to this section:

Capital plan means a plan describing the means and schedule by which a national bank will attain specified capital levels or ratios, including a capital restoration plan filed with the OCC under 12 U.S.C. 1831o and 12 CFR 6.5.

Original maturity means the stated maturity of the subordinated debt note. If the subordinated debt note does not have a stated maturity, then original maturity means the earliest possible date the subordinated debt note may be redeemed, repurchased, prepaid, terminated, or otherwise retired by the national bank pursuant to the terms of the subordinated debt note.

Payment on subordinated debt means principal and interest, and premium, if any.

Tier 2 capital has the same meaning as set forth in 12 CFR 3.20(d).

(d) Requirements for issuance of subordinated debt. A national bank issuing subordinated debt must satisfy the requirements of this paragraph (d).

(1) Minimum terms. The terms of any subordinated debt note issued by a national bank must:

- (i) Have a minimum original maturity of at least five years;
- (ii) Not be a deposit and not insured by the Federal Deposit Insurance Corporation (FDIC);
- (iii) Be subordinated to the claims of depositors;
- (iv) Be unsecured, which would include prohibiting the establishment of any legally enforceable fund earmarked for payment of the subordinated debt note through:
  - (A) A sinking fund; or
  - (B) A compensating balance or any other funds or assets subject to a legal right of offset, as defined by applicable state law;
- (v) Be ineligible as collateral for a loan by the issuing national bank;
- (vi) Provide that once any scheduled payments of principal begin, all scheduled payments shall be made at least annually and the amount repaid in each year shall be no less than in the prior year; and
- (vii) Provide that, where applicable, no payment (including payment pursuant to an acceleration clause, redemption prior to maturity, repurchase, or exercising a call option) shall be made without prior OCC approval.

(2) Corporate authority. A subordinated debt note must not include any provision or covenant that unduly restricts or otherwise acts to unduly limit the authority of a national bank or

interferes with the OCC's supervision of the national bank. Specifically, this would include a provision or covenant that:

(i) Maintains a certain minimum amount in its capital accounts or other metric, such as minimum capital assets, liquidity, or loan ratios;

(ii) Unreasonably restricts a national bank's ability to raise additional capital through the issuance of additional subordinated debt or other regulatory capital instruments;

(iii) Provides for default and acceleration of the subordinated debt as the result of a change in control, if such change in control results from the OCC's exercise of its statutory authority to require a national bank to sell stock in that national bank, enter into a merger or consolidation, or be acquired by a bank holding company;

(iv) Requires the prior approval of a purchaser or holder of the subordinated debt note in the case of a voluntary merger by a national bank where the resulting institution:

(A) Assumes the due and punctual performance of all conditions of the subordinated debt note and agreement; and

(B) Is not in default of the various covenants of the subordinated debt; and

(v) Provides for default and acceleration of the subordinated debt as the result of a default by a subsidiary (including a limited liability company) of the national bank, unless:

(A) There is a separate agreement between the subsidiary and the purchaser of the national bank's subordinated debt note; and

(B) Such agreement has been reviewed and approved by the OCC.

(3) Disclosure requirements. (i) A national bank must disclose clearly on the face of any subordinated debt note the following language in all capital letters:

(A) THIS OBLIGATION IS NOT A DEPOSIT AND IS NOT INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION; and

(B) THIS OBLIGATION IS SUBORDINATED TO CLAIMS OF DEPOSITORS AND GENERAL CREDITORS, IS UNSECURED, AND IS INELIGIBLE AS COLLATERAL FOR A LOAN BY [INSERT NAME OF ISSUING NATIONAL BANK].

(ii) A national bank must disclose clearly and accurately in the subordinated debt note:

(A) The order and level of subordination, and in addition to being subordinated to the claims of depositors, provide that, at a minimum, the subordinated debt note is subordinate and junior in its right of payment to the obligations of all creditors, including both secured and unsecured or general creditors, except those specifically designated as ranking on a parity with, or subordinated to, the subordinated debt note;

(B) A general description of the OCC's regulatory authority with respect to a national bank in danger of insolvency that includes:

(1) With respect to insolvency, that the FDIC, acting as receiver, has authority to transfer a national bank's obligation under the subordinated debt note and to supersede or void any default, acceleration, or subordination that may have occurred;

(2) If a national bank that is "undercapitalized" as defined by applicable law fails to satisfactorily implement a required capital restoration plan, the national bank may be subject to all the additional restrictions and requirements applicable to a "significantly undercapitalized" institution, as defined by applicable law, including being required to sell shares in the national bank, being acquired by a depository institution holding company, or being merged or consolidated with another depository institution, and this authority supersedes and voids any defaults that may have occurred; and

(3) If a national bank is "critically undercapitalized," as defined by applicable law, the national bank is prohibited from making principal or interest payments on the subordinated debt note without prior regulatory approval; and

(C) A description of the OCC's authority under 12 CFR 3.11 to limit distributions, including interest payments on any tier 2 capital instrument if the national bank has full discretion to permanently or temporarily suspend such payments without triggering an event of default.

(iii) A national bank must comply with the Securities Offering Disclosure Rules in 12 CFR part 16.

(e) Additional requirements to qualify as tier 2 capital. In order to qualify as tier 2 capital, a national bank's subordinated debt must meet the requirements in 12 CFR 3.20(d), including, for an advanced approaches national bank, the disclosure requirement in 12 CFR 3.20(d)(1)(xi).

(f) Process and procedures--(1) Issuance of subordinated debt--(i) Approval--(A) Eligible bank. An eligible bank is required to receive prior approval from the OCC to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section, if:

- (1) The national bank will not continue to be an eligible bank after the transaction;
- (2) The OCC has previously notified the national bank that prior approval is required; or
- (3) Prior approval is required by law.

(B) National bank not an eligible bank. A national bank that is not an eligible bank must receive prior OCC approval to issue any subordinated debt, in accordance with paragraph (g)(1)(i) of this section.

(ii) Notice to include subordinated debt in tier 2 capital. All national banks must notify the OCC, in accordance with paragraph (h) of this section, within ten days after issuing subordinated debt that is to be counted as tier 2 capital. Where a national bank's application to issue subordinated debt has been deemed to be approved, in accordance with paragraph (g)(2)(i) of this section, the national bank must notify the OCC, pursuant to paragraph (h) of this section,

after issuance of the subordinated debt. A national bank may not include subordinated debt as tier 2 capital unless the national bank has filed the notice with the OCC and received notification from the OCC that the subordinated debt issued by the national bank qualifies as tier 2 capital.

(2) Prepayment of subordinated debt--(i) Subordinated debt not included in tier 2 capital--

(A) Eligible bank. An eligible bank is required to receive prior approval from the OCC to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section, only if:

(1) The national bank will not be an eligible bank after the transaction;

(2) The OCC has previously notified the national bank that prior approval is required;

(3) Prior approval is required by law; or

(4) The amount of the proposed prepayment is equal to or greater than one percent of the national bank's total capital, as defined in 12 CFR 3.2.

(B) National bank not an eligible bank. A national bank that is not an eligible bank must receive prior OCC approval to prepay any subordinated debt that is not included in tier 2 capital (including acceleration, repurchase, redemption prior to maturity, and exercising a call option), in accordance with paragraph (g)(1)(ii) of this section.

(ii) Subordinated debt included in tier 2 capital--(A) General. Notwithstanding paragraph (f)(2)(i)(B) of this section, all national banks must receive prior OCC approval to prepay subordinated debt included in tier 2 capital, in accordance with paragraph (g)(1)(ii)(A) of this section.

(B) Call option. Notwithstanding this paragraph (f)(2)(ii)(A) of this section, a national bank must receive prior OCC approval to prepay subordinated debt included in tier 2 capital, in

accordance with paragraph (g)(2)(ii)(B) of this section, when the prepayment is a result of exercising a call option.

(g) Prior approval procedure--(1) Application--(i) Issuance of subordinated debt. A national bank required to obtain OCC approval before issuing subordinated debt shall submit an application to the appropriate OCC licensing office. The application must include:

- (A) A description of the terms and amount of the proposed issuance;
- (B) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan;
- (C) A copy of the proposed subordinated note format and note agreement; and
- (D) A statement that the subordinated debt issue complies with all applicable laws and regulations.

(ii) Prepayment of subordinated debt--(A) General. A national bank required to obtain OCC approval before prepaying subordinated debt, pursuant to paragraph (f)(2) of this section, shall submit an application to the appropriate OCC licensing office. The application must include:

- (1) A description of the terms and amount of the proposed prepayment;
- (2) A statement of whether the national bank is subject to a capital plan or required to file a capital plan with the OCC and, if so, how the proposed change conforms to the capital plan; and

(3) A copy of the subordinated debt instrument the national bank is proposing to prepay.

(B) Call option. (1) Before prepaying subordinated debt if the prepayment is in the form of a call option, a national bank is required to obtain OCC approval, pursuant to paragraph (g)(2)(ii) of this section, by submitting an application to the appropriate OCC licensing office.



(2) In addition to the information required in this paragraph (g)(1)(ii)(A) of this section, the application must include:

(i) A statement explaining why the national bank believes that following the proposed prepayment the national bank would continue to hold an amount of capital commensurate with its risk; or

(ii) A description of the replacement capital instrument that meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20, including the amount of such instrument, and the time frame for issuance.

(iii) Additional information. The OCC reserves the right to request additional relevant information, as appropriate.

(2) Approval--(i) General. The application is deemed approved by the OCC as of the 30th day after the filing is received by the OCC, unless the OCC notifies the national bank prior to that date that the filing presents a significant supervisory, or compliance concern, or raises a significant legal or policy issue.

(ii) Call option. Notwithstanding this paragraph (g)(2)(i) of this section, if the application for prior approval is for prepayment in the form of a call option, the national bank must receive affirmative approval from the OCC to exercise the call option. If the OCC requires the national bank to replace the subordinated debt, the national bank must receive affirmative approval that the replacement capital instrument meets the criteria for tier 1 or tier 2 capital under 12 CFR 3.20 and must issue the replacement instrument prior to exercising the call option, or immediately thereafter.<sup>2</sup>

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<sup>2</sup> A national bank may replace tier 2 capital instruments concurrent with the redemption of existing tier 2 capital instruments.

(iii) Tier 2 capital. Following notification to the OCC pursuant to paragraph (f)(1)(ii) of this section that the national bank has issued the subordinated debt, the OCC will notify the national bank whether the subordinated debt qualifies as tier 2 capital.

(iv) Expiration of approval. Approval expires if a national bank does not complete the sale of the subordinated debt within one year of approval.

(h) Notice procedure for inclusion in tier 2 capital. (1) All national banks shall notify the appropriate OCC licensing office in writing within ten days after issuing subordinated debt that it intends to include as tier 2 capital. A national bank may not include such subordinated debt in tier 2 capital unless the national bank has received notification from the OCC that the subordinated debt qualifies as tier 2 capital.

(2) The notice must include:

(i) The terms of the issuance;

(ii) The amount and date of receipt of funds;

(iii) A copy of the final subordinated note format and note agreement; and

(iv) A statement that the issuance complies with all applicable laws and regulations.

(i) Exceptions to rules of general applicability. Sections 5.8, 5.10, and 5.11 do not apply to transactions governed by this section.

Dated: December 10, 2014.

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Thomas J. Curry,  
Comptroller of the Currency.

